No. 96-3

(2)

Supreme Court, U.S.
FILED
AUG 1 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

STATE OF TEXAS,

Petitioner,

vs.

SIERRA CLUB, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the State of Texas waive Eleventh Amendment immunity when it voluntarily intervened and played a central adversarial role in federal proceedings?

2. Does the Eleventh Amendment prohibit a federal district court from assessing monitor's costs against a State agency party?

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INTRODUCTION

Unregulated pumping from the Edwards Aquifer endangers certain species that live in springs fed by the Aquifer. In 1991 the Sierra Club sued federal defendants under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq. (1973), to force a federal recovery plan for the species. Two Texas State agencies moved to intervene as plaintiff-intervenors. The State agencies sought a central role in the development of a joint State-federal plan for regulation of the Edwards.

In 1993 the district court ordered limited relief against the federal defendants and one of the State intervenors. The court provided that the State should be given an opportunity to develop and implement an adequate State plan before the court considered more drastic relief. In response, the Texas legislature created a new State agency to regulate the Edwards. But an unrelated challenge to the new entity threw the State's role into confusion for several years. Early in 1994, the district court appointed a monitor to advise concerning potential post-judgment relief and assessed the State intervenors one-third of the costs of the monitor. More than a year later, the State agencies appealed the order appointing the monitor and assessing costs. The court of appeals affirmed. The State of Texas has abandoned its challenge to the appointment of the monitor. Texas petitions for certiorari concerning the monitor's costs, claiming Eleventh Amendment immunity.

Assessing a portion of the monitor's costs to the State parties was entirely proper for two distinct reasons. The State agencies waived sovereign immunity by voluntarily

intervening, seeking and obtaining a central role in the federal proceedings. Moreover, this Court has repeatedly held that the assessment of costs against a State that is a party in federal court does not violate the Eleventh Amendment.

OPINIONS BELOW

In addition to the opinions below that the State of Texas provides as appendices, the following are pertinent:

The District Court for the Western District of Texas' May 26, 1993 Amended Judgment (Respondent's Appendix A), ordering relief against the federal defendants and one of the State intervenors, and reserving plaintiffs' right to seek additional post-judgment relief if the State did not have an adequate plan in place by May 31, 1993.

The District Court's first Order on Motion for Additional Relief (June 6, 1994) (Respondent's Appendix B), giving the monitor emergency planning duties and requiring the federal defendants to proceed with recovery planning.

The District Court's Order Directing the Monitor to Create a Panel (Sept. 30, 1994) (Respondent's Appendix C), directing the monitor to work with the parties and with other appropriate State and federal officials in an effort to "mediate and resolve" post-judgment issues "and avoid further Court intervention."

STATEMENT OF THE CASE

Proceedings Below

Certain species living in the Edwards Aquifer and in two Edwards-fed springs are endangered by excessive pumping. The Sierra Club sued the Secretary of the Interior and the United States Fish & Wildlife Service ("USFWS") in 1991 for failure to develop and implement an adequate recovery plan for the Edwards-dependent species under ESA Section 4. The Texas Water Commission ("TWC") and the Texas Parks and Wildlife Department sought intervention as plaintiff-intervenors. These State agencies asked for affirmative relief: that the federal defendants be ordered "to develop and implement a comprehensive plan, in cooperation with the [two state agencies] as lead agencies," to regulate Edwards pumping. Record Excerpt 10, State of Texas' Motion to Intervene at 32. The district court realigned them as defendant-intervenors, along with a third State agency, the Texas Department of Agriculture. R. 1406-1411, 1696-97.

The district court found that the threat to the Edwards-dependent species was caused by excessive pumping unregulated by the State. Findings Nos. 24-26, 28, 37, 39, 97, *Sierra Club v. Lujan*, 1993 WL 151353 (W.D. Tex. 1993). The district court ordered the federal defendants to determine minimum spring flows; ordered the lead state agency to develop and file with the court an adequate regulatory plan; and deferred ruling on additional relief until after May 31, 1993, in hopes that the Texas legislature would provide for adequate state regulation. Respondent's App. A4-5. The federal defendants determined minimum spring flows, the state filed a plan,

the Texas legislature passed a statute creating an Edwards Aquifer Authority ("EAA"), and the court of appeals dismissed the appeals of the defendant-intervenors. *Sierra Club v. Babbitt*, 995 F.2d 571 (5th Cir. 1993).

The EAA, however, was unable to begin regulating Edwards pumping because of a challenge under the federal Voting Rights Act. *See Texas v. United States*, 866 F. Supp. 20 (D.D.C. 1994). As it became clear in late 1993 that the Voting Rights Act challenge was serious, the district court appointed a monitor to advise on the potential need for additional relief under the ESA. Petitioner's App. E1. The State agencies opposed the appointment of a monitor as premature and, in the alternative, urged that the Texas Natural Resources Conservation Commission (successor to the TWC) be appointed. R. 4730-4738.

The court allocated the costs of the monitor one-third to the federal defendants, one-third to the State defendant-intervenors, and one-third to the largest pumper-intervenor, the City of San Antonio. Petitioner's App. E5. All appealed, but dismissed their appeals on September 29, 1994 without prejudice to reinstatement in 180 days.

The district court directed the monitor to prepare an emergency withdrawal reduction plan for potential use in the summer of 1994. Respondent's App. B2. The court later ordered the monitor to lead a joint State-federal effort to "mediate and resolve" a voluntary settlement of the underlying issues without the need for further court intervention. Respondent's App. C2. The district court also ordered the federal defendants to proceed with a revised recovery plan. No one appealed these orders.

In March 1995 the State defendant-intervenors reinstated their appeals of the order appointing the monitor and charging them with a portion of his costs, and moved for a stay of the monitor's activities. The court of appeals refused their request for an order stopping all activities of the monitor and the district court, but allowed the State parties to pay their one-third share into the registry of the district court, pending their appeal.

To cure the Voting Rights Act deficiency the Texas legislature in its 1995 session amended the EAA's statute. Act of May 29, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Sess. Law Serv. 2505, *amending* Act of May 30, 1993, 73rd Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2353. Before the EAA could begin operations in the summer of 1995, a Texas state district court enjoined it on state constitutional grounds. As drought conditions worsened in the region, the Sierra Club sought additional post-judgment relief against the federal defendants under the ESA, including a January 1, 1996 deadline for completion of an adequate federal recovery plan. On October 18, 1995, the court of appeals ordered the district court to evaluate whether abstention was appropriate and stayed further activities of the monitor. Petitioner's App. C6. In an order dated November 29, 1995, the district court concluded that abstention was not appropriate.

In February 1996, the federal defendants finally published their recovery plan. The court of appeals immediately affirmed the district court's appointment of the monitor:

> Because [Texas] sought to be included in the remedy, when it sought to be ordered to develop its own plan for management of the Edwards,

> and then embarked on an arduous journey to create a regulatory entity, the district court cannot be faulted for appointing an expert to assist in effectuating the judgment.

Petitioner's App. D10.

The court of appeals likewise affirmed the district court's order holding Texas responsible for part of the costs of enforcing the judgment:

> " . . . because Texas injected itself into the remedial process by asking to participate in the creation of its own plan for management of the Edwards, it may be held responsible for bearing a portion of the cost of the monitor."

Id. at D11.

The court of appeals also concluded that the publication of the recovery plan gave the Sierra Club "all relief sought, all that could be awarded" in this case, *id.* at D12, and that the Club would have to seek any additional relief in a new suit. *Id.* at D13. The court of appeals therefore remanded "with instructions that the district court take the ministerial steps necessary to conclude this case promptly." *Id.* The court of appeals then denied the State's petition for rehearing and for stay pending petition for certiorari. When the circuit justice also denied stay, the district court on May 1, 1996 ordered payment from its registry to the monitor of the remaining balance and, on May 17, 1996, concluded the case below.

Since then, the springs have fallen far below the levels at which the continued existence of the Edwards-dependent species is jeopardized. In the continued absence of any state response, the Sierra Club filed a new

suit under Section 9 of the ESA, seeking court-ordered pumping restrictions. On June 28, 1996, the Texas Supreme Court affirmed the constitutionality of the EAA statute, 9-0. The district court has deferred action in the new ESA suit pending an opportunity for the EAA to take appropriate emergency action.

TEXAS' PETITION FOR CERTIORARI LACKS MERIT

The State of Texas no longer challenges the appointment of the monitor. It now challenges only the district court's order assessing to the State parties one-third of the monitor's costs. The State claims that such assessment violates the Eleventh Amendment. The State's Eleventh Amendment claim is frivolous for two distinct and independent reasons.

First, the State voluntarily intervened in this lawsuit, deliberately seeking to play a central role in the attempt to develop plans for the Edwards Aquifer. This Court long ago adopted the common-sense rule that a State may voluntarily waive its Eleventh Amendment immunity and does so when it accedes to federal jurisdiction by intervening in a federal proceeding.

The seminal case is *Clark v. Bernard*, 108 U.S. 436, 447, 2 S.Ct. 878, 883 (1883), in which the State of Rhode Island intervened in a federal proceeding as claimant of a bond held by a bankruptcy estate. When the court attempted to adjudicate the rights of Rhode Island in the bankruptcy proceeding, the State argued that any such adjudication would violate the Eleventh Amendment. This Court dismissed Rhode Island's argument as follows:

> The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction.

The common-sense rule articulated in *Clark v. Bernard* has never been seriously questioned. This Court cited that rule with approval in *Atascadero State Hosp. v. Scanlan*, 473 U.S. 234, 238, 105 S.Ct. 3142, 3145 (1985), as an example of the circumstances under which a State waives its Eleventh Amendment rights.

This Court's recent opinion in *Seminole Tribe v. Florida*, 116 S.Ct. 1114 (1996), on which the State primarily relies, casts no doubt on this conclusion. That case involved a State as an *unwilling* defendant in federal court, a point the Chief Justice, in his opinion for the majority, repeatedly emphasized:

> For over a century we have reaffirmed that federal jurisdiction over suits against *unconsenting* States "was not contemplated by the Constitution when establishing the judicial power of the United States." Here, petitioner has sued the State of Florida and it is undisputed that Florida has *not consented* to the suit.

Id. at 1122-23 (citations omitted, emphasis added). The Chief Justice went on to distinguish another case by pointing out that it involved "the unremarkable, and

completely unrelated, proposition that the States may waive their sovereign immunity." *Id.* at 1128.

Second, and equally dispositive of the State's constitutional claims, this Court has repeatedly ruled that the assessment of litigation *costs* against a State in federal court does not violate the Eleventh Amendment. In *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565 (1978), this Court summarized the rule as follows:

> Costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity. The practice of awarding costs against the States goes back to 1849 in this Court. *See Missouri v. Iowa*, 7 How. 660, 681, 12 L.Ed. 861, 870; *North Dakota v. Minnesota*, 263 U.S. 583, 44 S.Ct. 208, 68 L.Ed. 461 (collecting cases). The Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants.
>
> In *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 48 S.Ct. 97, 72 L.Ed. 168, the State challenged this Court's award of costs, but we squarely rejected the State's claim of immunity. . . . A federal court's interest in orderly, expeditious proceedings "justifies [it] in treating the state just as any other litigant, and in imposing costs upon it" when an award is called for. *Id.*, at 77, 48 S.Ct., at 100.

437 at 695-96, 98 S.Ct. at 2576.

The rule applied in *Hutto v. Finney* was reaffirmed in *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 109 S.Ct. 2463 (1989). In that case this Court held that interest assessed against a State for delay in paying attorneys' fees did not violate the Eleventh Amendment. The three justices who

dissented in *Missouri v. Jenkins by Agyei* accepted the rule that the assessment of costs against a State did not violate the Eleventh Amendment but believed that the interest at issue constituted damages rather than costs. There can be no doubt that the costs associated with a court-appointed monitor constitute costs as opposed to damages for past conduct.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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August 1, 1996

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APPENDIX A

Excerpts from the District Court
for the Western District of Texas'
May 26, 1993 Amended Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

SIERRA CLUB,	§	
Plaintiff,	§	
GUADALUPE-BLANCO RIVER AUTHORITY, ET AL.,	§	
Plaintiff-Intervenors,	§	MO-91-CA-069
V.	§	
BRUCE BABBITT, in his official capacity as Secretary, Department of Interior, and THE UNITED STATES FISH AND WILDLIFE SERVICE,	§	
Defendants,	§	
DANNY McFADIN, TOMMY WALKER, CARL MUECKE, ET AL.,	§	
Defendant-Intervenors.	§	

AMENDED JUDGMENT

On February 1, 1993, this Court filed its Judgment and separate Findings of Fact and Conclusions of Law in the above-captioned cause. On limited remand from the U.S. Court of Appeals for the Fifth Circuit, this Court now has under consideration the Federal Defendants' and Plaintiffs' Joint Motion to Clarify the Judgment and

Findings. This Court finds that such motion is well taken and that it should be GRANTED.

IT IS THEREFORE ORDERED that the Federal Defendants' and Plaintiffs' Joint Motion to Clarify the Judgment and Findings is hereby GRANTED, and the Court's February 1, 1993 Judgment is hereby amended pursuant to Rule 60 of the Federal Rules of Civil Procedure to read as set forth herein.

THIS COURT, by separate Amended Findings of Fact and Conclusions of Law, ruled in favor of Plaintiff and Plaintiff-Intervenors in the above-captioned cause. This Court's rulings properly dispose of Plaintiff's, Plaintiff-Intervenors', Defendants', Defendant-Intervenors', and *Amici Curiae* issues in their entirety. Accordingly, the following Judgment, pursuant to Rule 58 of the Federal Rules of Civil Procedure, is appropriate. Accordingly,

IT IS THEREFORE ORDERED that, in connection with Plaintiffs' allegations of violations by the Federal Defendants of the Endangered Species Act (the "ESA"), the following minimum springflow findings shall serve as *interim* springflow findings for all purposes under the ESA, until the United States Fish and Wildlife Service (the "USFWS") modifies those findings as set forth below:

. . .

IT IS FURTHER ORDERED that the USFWS may at any time modify the *interim* minimum springflow findings, based on available information and in the exercise of its best professional judgment.

IT IS FURTHER ORDERED that the USFWS shall determine within forty-five (45) days of the filing of this

Judgment based on available information and in the exercise of its best professional judgment, each of the following to the extent that it has not yet made such determinations:

(1) the springflow at Comal Springs at which Fountain Darters begin to be "taken" as springflow drops;

(2) the minimum springflow required at Comal Springs to avoid appreciable reduction in the likelihood of survival and recovery of the Fountain Darter in the wild;

(3) the minimum springflow required at San Marcos Springs to avoid appreciable diminution of the value of critical habitat for the survival and recovery of any listed species;

(4) the springflow at San Marcos Springs at which Texas Wildrice begins to be damaged or destroyed as the springflow drops;

(5) the springflow at San Marcos Springs at which any listed wildlife species begins to be "taken" as the springflow drops;

(6) the minimum springflow required at San Marcos Springs to avoid appreciable reduction in the likelihood of survival and recovery of any listed species in the wild;

(7) the minimum springflows or minimum water levels in the Edwards at which Texas Blind Salamanders begin to be "taken" as springflows and water levels drop; and

(8) the minimum springflows or minimum water levels in the Edwards required to

> avoid appreciable reduction in the likelihood of survival and recovery the Texas Blind Salamander in the wild.

. . .

IT IS FURTHER ORDERED that the USFWS shall promptly provide all Federal agencies to which Plaintiff or Plaintiff-Intervenors gave notices of violations (the "Federal Agencies") with a copy of this Judgment, and the USFWS shall further advise all Federal Agencies of each minimum springflow and Edwards Aquifer level determination made by the USFWS, and of any modification made by the USFWS to any such determination or to any interim minimum springflow finding made by this Court, promptly upon the USFWS making that determination or modification, so that those agencies will be able to perform their duties under the ESA *if the State of Texas fails or refuses to regulate withdrawals from the Edwards Aquifer* to whatever extent may be required to avoid jeopardy to, and destruction or adverse modification of critical habitat of, any listed species.

. . .

IT IS THEREFORE ORDERED that Defendant-Intervenor the Texas Water Commission shall prepare a plan that, in its best professional judgment, assures that the Comal Springs and San Marcos Springs will not drop below jeopardy levels as defined by the USFWS, even in a repeat of the drought of record, and it shall submit that plan to the Court and all parties by not later than March 1, 1993.

IT IS FURTHER ORDERED that Plaintiff and Plaintiff-Intervenors may seek appropriate relief from this

Court at any time *after* May 31, 1993 (the last day of the current regular session of the Texas legislature) *if the State of Texas does not have in effect at such time*, pursuant to new or existing State law, a regulatory system pursuant to which withdrawals from the Edwards Aquifer can and will be limited to whatever extent may be required to avoid unlawful takings of listed species, any appreciable reduction in the likelihood of survival and recovery of listed species in the wild, and any appreciable diminution of the value of critical habitat for the survival and recovery of any listed species, even in a repeat of the drought of record.

IT IS FURTHER ORDERED that upon Motion by Plaintiff and Plaintiff-Intervenors and Order by this Court, the parties are put on notice that this matter is tentatively scheduled for further hearing on Monday, June 28, 1993, to address the following issues:

(1) the status of review by the Texas courts of the TWC's efforts to regulate withdrawals from the Edwards Aquifer based on the TWC's determination that the water is owned by the state in trust for the benefit of the public;

(2) new State laws, if any, relative to the Edwards Aquifer;

(3) the status of applications for new listings of other species that rely upon springflows from the Comal or San Marcos Springs, or that live underground in the Edwards Aquifer;

(4) the status of USFWS' efforts to define, and then refine, the Comal and San Marcos

minimum springflows, and the Edwards Aquifer minimum levels, required for the conservation and survival of listed species; and

(5) any additional relief sought by Plaintiff and Plaintiff-Intervenors under Federal law because of inadequacy of state law or because of inadequacy of the State's implementation under that law.

. . .

SIGNED this 26th day of May, 1993.

/S/
HONORABLE
LUCIUS D. BUNTON, III
SENIOR DISTRICT JUDGE

APPENDIX B

Excerpts from the District Court for the Western District of Texas' June 3, 1994 Order on Motion for Additional Relief

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

SIERRA CLUB,	§	
Plaintiff,	§	
GUADALUPE-BLANCO RIVER AUTHORITY, ET AL.,	§	
Plaintiff-Intervenors,	§	MO-91-CA-069
V.	§	
BRUCE BABBITT, in his official capacity as Secretary, Department of Interior, and THE UNITED STATES FISH AND WILDLIFE SERVICE,	§	
Defendants,	§	
DANNY McFADIN, TOMMY WALKER, CARL MUECKE, ET AL.,	§	
Defendant-Intervenors.	§	

ORDER ON MOTION FOR ADDITIONAL RELIEF

BEFORE THIS COURT, is Plaintiff Sierra Club's Motion for Additional Relief requesting that the Court (1) declare a present emergency caused by excessive, unregulated pumping from the Edwards Aquifer; (2) direct the Monitor to prepare emergency plans; and (3) order the

Federal Defendants, Secretary of the Interior Bruce Babbitt and the Fish and Wildlife Service (FWS), to complete mandatory recovery planning. . . . Having reviewed the Motion, the Responses, and Plaintiff's Reply, it is the opinion of the Court Plaintiff's request for declaration of a present emergency should be denied, Plaintiff's request for the preparation by the Monitor of an emergency withdrawal reduction plan should be granted, and Plaintiff's request for an Order directing the Federal Defendants to complete mandatory recovery planning should be granted.

. . .

Preparation of Emergency Plan

The Court believes, however, that previous findings and conclusions reached by the Court support granting Plaintiff's request that the Court direct the Monitor to prepare an emergency withdrawal reduction plan. The Court has previously found violations of § 9 of the Endangered Species Act (ESA) have occurred in the past; there is a likelihood violations will occur in the future in the absence of pumping regulations; there is no plan in effect by any Federal, State, or local governmental entity adequately protecting against violations of the ESA caused by unregulated pumping from the Edwards Aquifer; and additional remedial relief may be necessary in order to prevent future violations of the ESA caused by unregulated pumping from the Aquifer. The Court further finds any future remedial relief ordered by this Court as necessary to prevent violations of federal law will most certainly include court-ordered restrictions on pumping from the Aquifer.

. . .

It should be carefully noted that the Court does not consider ordering the Monitor to prepare an emergency withdrawal reduction plan to be injunctive relief. The Monitor is not a party to this cause of action. As previously stated, this Court has "inherent equitable power to appoint a person, whatever his title, to assist it in administering a remedy." *Ruiz v. Estelle*, 679 F.2d 1115, 1161, *amended in part, vacated in part*, 688 F.2d 266 (5th Cir.), *cert. denied*, 460 U.S. 1042 (1983); Order Appointing Joe G. Moore, Jr. as Monitor at 4. The Court has previously found that "[i]f current levels of withdrawals are allowed to continue without reduction, endangered and threatened species will be taken, damaged, or destroyed; their designated critical habitat destroyed or adversely modified; and their continued existence severely jeopardized during dry periods or relatively mild droughts." Amended Finding 37 (emphasis added). Since there are still no effective restraints on levels of withdrawals from the Aquifer, future violations of the ESA are highly possible. There appears little logic in recognizing an inherent power of the Court to appoint a Monitor to assist in administering a remedy without also recognizing that same power, in unusual circumstances such as these, to appoint a Monitor to advise the Court on the need for and appropriateness of remedies which it is highly possible will be needed in the future. The Court finds that ordering the Monitor to prepare an emergency pumping reduction plan by August 1, 1994, would further the just, speedy, and inexpensive determination of any future

action in which the ultimate relief sought is the regulation of pumping from the Edwards Aquifer. Fed. R. Civ. P. 1.

. . .

A hearing on the need for actual implementation of an emergency plan will not be scheduled until and unless there is filed with the Court an application for injunctive relief requesting imposition of an emergency withdrawal reduction plan. At that time, the parties will be allowed to present evidence on the need for actual implementation of any emergency plan.

Development and Implementation of a Recovery Plan

Finally, the Sierra Club requests the Court order the Federal Defendants to complete their recovery planning. The Court finds this requested additional relief is also supported by the Court's Amended Findings and Conclusions. This Court has previously found that the Federal Defendants failed to implement the existing San Marcos Recovery Plan, and they failed to develop a plan for Comal Springs, thereby neglecting their nondiscretionary duties under § 4(f) of the ESA, 16 U.S.C. § 1533(f). *See* Amended Findings 64-71; *Sierra Club v. Babbitt*, 995 F.2d 571, 574 (5th Cir. 1993). The Federal Defendants do not claim this failure has been remedied and do not claim they no longer have such a duty. It appears, therefore, the Plaintiff's request for an order to the Federal Defendants to comply with their duties under § 4(f) is well taken and should be granted. Notwithstanding the objections of the City of San Antonio and the Federal Defendants, the Court discerns no procedural or legal barriers to granting this requested relief. Accordingly,

IT IS ORDERED the Monitor shall prepare, on or before August 1, 1994, an emergency withdrawal reduction plan adequate to prevent jeopardy at Comal Springs at all times, beginning this summer, even in a repeat of the drought of record.

IT IS FURTHER ORDERED any party who wishes to do so may submit, no later than August 1, 1994, an alternative proposed emergency withdrawal reduction plan.

IT IS FINALLY ORDERED the Secretary and the FWS shall publish a proposed recovery plan or plans for the Texas Blind Salamander and for the Comal Springs populations of Fountain Darters and San Marcos (or other unique) salamanders on or before August 1, 1994. The Secretary and the FWS shall be free to propose separate recovery plans for each such species, or to combine any or all of them with each other and with the revision to the San Marcos Recovery Plan. These recovery plans shall include "(i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species; (ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of [§ 4 of the ESA, 16 U.S.C. § 1533], that the species be removed from the list; and (iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal." 16 U.S.C. § 1533(f)(1)(B). These plans shall include such combinations of pumping restrictions, federal action agency ESA § 7 cutoffs of permits or funds or other actions, and other affirmative measures as appear necessary and appropriate to protect the Aquifer

and the species dependent on the Aquifer, even if a repeat of the drought of record begins now, assuming the continued indefinite absence of an adequate state or regional plan. In the alternative, the Secretary shall file a brief with the Court on or before June 13, 1994, stating that "he finds that such a plan will not promote the conservation of the species" and the specific reasons for that finding. 16 U.S.C. § 1533(f)(1).

SIGNED this 3rd day of June, 1994.

/S/
HONORABLE
LUCIUS D. BUNTON III
SENIOR DISTRICT JUDGE

APPENDIX C

Excerpts from the District Court for the Western District of Texas' September 30, 1994 Order Directing Monitor to Create a Panel

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

SIERRA CLUB,	§	
Plaintiff,	§	
GUADALUPE-BLANCO RIVER AUTHORITY, ET AL.,	§	
Plaintiff-Intervenors,	§	MO-91-CA-069
V.	§	
BRUCE BABBITT, in his official capacity as Secretary, Department of Interior, and THE UNITED STATES FISH AND WILDLIFE SERVICE,	§	
Defendants,	§	
DANNY McFADIN, TOMMY WALKER, CARL MUECKE, ET AL.,	§	
Defendant-Intervenors.	§	

ORDER DIRECTING THE MONITOR TO CREATE A PANEL

ALTHOUGH THE COURT is satisfied there is no present emergency warranting immediate action by this Court and the parties presently before the Court are working to address concerns previously identified by the Court in this case, the Court has been apprised by the

Monitor, Mr. Joe G. Moore, Jr., an emergency situation concerning the Edwards Aquifer was only narrowly averted this year. The Monitor further advises the Court an emergency situation in 1995 is highly possible unless the recharge area experiences extremely heavy rainfall.

The Court believes, therefore, the Monitor should be directed to work with the parties now before the Court, with other regional interests, with members of the Texas Legislature, and with other appropriate State and Federal officials in an effort to mediate and resolve water resource management and endangered species issues in a manner that will address concerns previously identified by the Court and avoid further Court intervention

. . .

Creation of a Panel

IT IS ORDERED the Monitor shall create and chair a Panel whose primary purpose it is to develop incidental take permit applications pursuant to § 10(a) of the A, 16 U.S.C. § 1539(a). . . .

IT IS FURTHER ORDERED all parties and non-parties and their representatives are strongly urged to cooperate fully with the Monitor so the Monitor can perform his duties to the best of his abilities, as efficiently as possible, and at the lowest possible cost. In this regard, the Court notes both the Texas Natural Resource Conservation Commission ("TNRCC") and the EUWD, in their pleadings and presentations to the Court, have offered their substantial resources and expertise to assist the Court at their own cost. The Court also understands

counsel for Federal Defendants has made similar offers on behalf of the United States Geological Survey ("USGS"), an agency within the Department of the Interior. Accordingly, the TNRCC, EUWD and USGS are strongly urged to follow through on their offers and provide substantial assistance to the Monitor by making available necessary personnel and adequate resources to allow those personnel to respond promptly and thoroughly to the Monitor's requests. The Monitor may request such assistance from particular individuals within each agency, and the TNRCC, EUWD, and USGS are strongly urged to accommodate these requests if at all possible.

. . .

IT IS FINALLY ORDERED in the event the Panel does not reach consensus on any issue essential to the completion of its business, the Monitor shall so advise the Court. The Monitor shall provide a written Panel Progress Report to the Court at least every ten (10) days indicating the progress being made by the Panel and any problems which could have effect on the successful completion of the Panel's mission.

SIGNED this 30th day of September, 1994.

/S/
HONORABLE
LUCIUS D. BUNTON III
SENIOR DISTRICT JUDGE